IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 262.

THE SHAW-WALKER COMPANY, a corporation, and ROBERT B. HILLYARD and WALTER S. HILLYARD, doing business as Shine-All Sales Company, and LEAH B. WILSON, *Petitioners,*

v.

THE NATIONAL BENEFIT LIFE INSURANCE COMPANY, a corporation, and GILBERT A. CLARK and FRANK B. BRYAN, JR., Receivers of The National Benefit Life Insurance Company, a corporation (appointed in Equity Cause No. 53,391), *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

JOHN E. LASKEY,
509 Albee Building,
Washington, D. C.

FRANCIS C. BROOKE,
1366 National Press Building,
Washington, D. C.,
Attorneys for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENTS.

STATEMENT OF CASE.

Respondents deem a statement of the case is necessary in order to correct the inaccuracies and omissions in the Petition for Writ of Certiorari. They also rely upon the statement appearing in the opinion of the United States Court of Appeals for the District of Columbia (R. 500-503).

The decision of the United States Court of Appeals for the District of Columbia (R. 500-516), of which review is

here sought by petitioners, reversed the decree of the District Court of the United States for the District of Columbia (Mr. Justice Gordon) establishing a receivership in a statutory dissolution proceeding, hereinafter referred to as the "Shaw-Walker case", brought under the District of Columbia Code, for The National Benefit Life Insurance Company, a District of Columbia corporation, and holding that a prior equity receivership, in a proceeding hereinafter referred to as the "Pinkett case", had been created by the same court in excess of its jurisdiction and was superseded by the statutory proceeding and receivership (R. 130-133).

The National Benefit Life Insurance Company in June 1931 was in serious financial difficulties and its license to do business had been suspended in several States; new officers of the company were elected in that month, and the following month the company ceased writing new insurance (R. 138-144, 151-152, 322). On September 10, 1931, a bill seeking a receivership was filed by John Randolph Pinkett, a stockholder, officer and policyholder, alleging the company's insolvency, heavy impairment of its capital and legal reserves, and appointment of receivers in various states; it prayed a receivership to manage the corporation, and that upon final hearing such receivership might be made permanent,

> "and that such action may be taken by the Court, by way of dissolution of said corporation, or in such other manner as to the Court may seem just and proper and the equities of the case demand."

(R. 136-149).

After hearing, the Court on September 24, 1931, appointed a receiver pendente lite (R. 149-150); thereafter that receiver reported on the company's net worth, valuing assets on the best data then available, and suggested possible reorganization as a mutual company (R. 214-224). On December 9, 1931, the defendant corporation filed its

answer, verified by its President, John T. Risher, admitting the material allegations of the bill, and favoring an operating receivership (R. 150-154).

On final hearing, after testimony and argument, the court (Mr. Justice O'Donoghue) on February 19, 1932, delivered its opinion (R. 154-157) and on February 29, 1932, entered its decree (R. 157-158), expressly finding the company insolvent; said decree appointed Gilbert A. Clark and Frank B. Bryan, Jr., permanent receivers, and empowered them to carry on the business and administer the affairs of the company (with the exception of writing new insurance), to take possession of all its books, records, assets and properties, real and personal, and to have made an actuarial report and account of its affairs. Interference with said receivers was enjoined.

After the filing of the Pinkett bill, ancillary proceedings were instituted in eleven of the states in which the company did business (R. 160-165). With the Court's approval, under its order of April 8, 1932 (R. 270-277), the receivers modified or revived more than 65,000 previously existing policies. No new policies were written. The actuarial report showed the company's insolvency and the heavy impairment of legal reserves (R. 161). The receivers attempted to dispose of the modified business by sale or reinsurance, but without success, and no feasible plan for rehabilitation was presented (R. 160-165).

On August 31, 1933, the Court directed the receivers to discontinue collection of premiums, to sell all the company's property and to hold the proceeds for distribution to the parties entitled (R. 159-160). Pursuant to said order, the receivers liquidated the company's assets, in the District of Columbia and in the various States in which it had operated. The courts of the ancillary jurisdictions, relying upon the order appointing the receivers, and the order of liquidation, in the Pinkett case, turned over their net assets to the Pinkett receivers and remanded their claimants to the domiciliary court (R. 162-165).

On December 8, 1937, the receivers filed their report and account showing the results of liquidation (R. 160-169, 419-424;) the court referred the cause to the Auditor, and notice by publication was given to all policyholders and other creditors to file formal proofs of claim (R. 169-171).

In February, 1938, the Shaw-Walker Company and the intervening judgment creditors, petitioners herein, filed proofs of claims on their respective judgments with the Pinkett receivers (R. 100-102). John T. Risher and one of counsel for appellees (petitioners herein) also filed claims with the Pinkett receivers (R. 165-166).

The present statutory proceeding, Equity No. 55677—the Shaw-Walker case,—was begun May 12, 1933; process was served on John T. Risher, president of the defendant corporation (R. 439), who, being under injunction against interference with its affairs, transmitted said process and a copy of bill to the Pinkett receivers for whatever action they cared to take; counsel for Shaw-Walker Company also sent copy of the bill to one of counsel for said receivers (R. 439-440, 450-451). The bill alleged the company's insolvency and suspension of business, its ownership of property in the District of Columbia and elsewhere, and plaintiff's judgment against it, with return of execution "nulla bona"; it attacked the court's jurisdiction in the Pinkett case because of alleged defects in the bill, and prayed dissolution of the corporation, appointment of receivers who would "supersede" the Pinkett receivers, injunction against said Pinkett receivers, sale of the company's property and distribution of proceeds, and payment of plaintiff's claim, interest and costs (R. 1-10).

Robert B. Hillyard and Walter S. Hillyard, judgment creditors, and Leah B. Wilson, a policyholder, intervened and joined in the prayers of the bill (R. 120, 178-203). No other policyholder is a party to the proceeding.

The Pinkett receivers appeared for the corporation and moved to dismiss the suit; it was held by Mr. Justice Adkins that the court in the Shaw-Walker case had power to

dissolve the corporation but not to interfere with the liquidation then proceeding in the Pinkett case, and the motion was overruled (R. 11-13). The defendant corporation through its receivers then answered the bill (R. 14-18).

On December 10, 1937, the Shaw-Walker case came on for final hearing before Mr. Justice Gordon (R. 23); after hearing and argument the court took the case under advisement (R. 24-100), and on November 15, 1938, filed its opinion (R. 106-117), holding the court in the Pinkett case was without jurisdiction to appoint receivers, and that the Shaw-Walker case supersedes the Pinkett case.

Motion for rehearing was overruled (R. 117, 118), as was a motion made on July 19, 1938, for leave to file a supplemental answer setting forth the filing of proofs of claim in the Pinkett receivership by plaintiff and the intervening judgment creditors (petitioners herein) (R. 100-106).

On March 6, 1939, the court (Mr. Justice Gordon) made its Findings of Fact and Conclusions of Law (R. 118-130), and entered its decree (R. 130-133), holding that the court in the Pinkett case was without jurisdiction, that the order therein appointing receivers was void, and that the Shaw-Walker case "supersedes" the Pinkett case, all proceedings in which were permanently stayed; John T. Risher was appointed receiver, the Pinkett receivers were enjoined from acting as such, and directed to deliver all properties of the corporation in their possession; and fees were allowed to the attorneys for plaintiff and intervenors.

The defendant corporation and its receivers in the Pinkett case thereupon noted and perfected an appeal to the United States Court of Appeals for the District of Columbia (R. 133-134). Appellees (petitioners herein) moved to dismiss the appeal (R. 425-448). A purported consent of the corporation to said motion was filed at the direction of John T. Risher (R. 462-472). Appellees also moved for hearing before the Chief Justice and five Associate Justices of said Court of Appeals (R. 475-476). All said motions were overruled (R. 476, 516).

The Court of Appeals heard the case May 15, 1939 (R. 477). Its decision was rendered January 8, 1940 (R. 500-515) (111 F. 2d 497).

Appellees on January 23, 1940, filed a motion (R. 517-562) for a rehearing before the full bench, or in the alternative a stay of the mandate

> "pending an application *to be made by appellees* for allowance of writ of certiorari * * *" (R. 562). (Italics supplied.)

On May 18, 1940, petitioners filed in this Court a petition, not incorporated in the record, seeking an extension of time for filing petition for certiorari, and stating as a cause for such extension that

> " * * * it *has just been decided* to incur the expense"

of printing additional record, petition and brief. (Italics supplied.) The petition further stated that the extension of time would not operate as a hardship upon any one involved in the litigation, without revealing to the Court that the proceedings for liquidation and distribution to creditors in the Pinkett receivership had remained dormant since the Shaw-Walker decree of March 6, 1939, and would have to remain dormant until the determination of the petition for certiorari.

Extension of time was granted, and the instant petition for writ of certiorari was thereafter filed.

ARGUMENT.

I.

THE CASE INVOLVES PRIMARILY A MATTER OF LOCAL LAW.

Respondents submit that the petition for writ of certiorari should be denied, because the matter primarily involved is the application of the local dissolution statute of the District of Columbia and its effect on the general equity jurisdiction of the District Court of the United States.

This Court will not ordinarily review decisions of the United States Court of Appeals for the District of Columbia which are based upon statutes confined in their operation to the District of Columbia.

Del Vecchio v. *Bowers*, 296 U. S. 280, 285.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA WAS RIGHT AND SHOULD NOT BE DISTURBED.

The United States Court of Appeals for the District of Columbia was right in reversing the decree of the District Court of the United States for the District of Columbia (Gordon, J.) in the Shaw-Walker case, because of errors of that decree in denying the jurisdiction of the same court in the Pinkett case.

The Pinkett case was not designed for statutory dissolution and incidental receivership, but was intended to invoke, and was sufficient to invoke, the Court's general equity jurisdiction. The Court had jurisdiction over the subject-matter, over the parties, and over the *res*.

Cooper v. *Reynolds*, 10 Wall. 308, 315, 316;
Binderup v. *Pathe Exchange, Inc.*, 263 U. S. 291, 305-306.

The primary question in issue in this appeal was whether the District Court, in the statutory proceeding, could declare void for want of jurisdiction the prior decree of another Justice of the same Court, appointing receivers for the same corporation in the equity case. That jurisdiction was one of the questions necessary to be determined in the Pinkett case, and any error in deciding it would not authorize even the same Court, in a collateral suit, to treat the decree as void.

Mellen v. *Moline Iron Works*, 131 U. S. 352, 367;
Shields v. *Coleman*, 157 U. S. 168, 178;
Johnson v. *Manhattan Railway Co. et al.*, 289 U. S. 479, 496.

The decision of Mr. Justice Gordon erroneously assumed that receivership can be had only as an incident to a statutory dissolution. His further attempt to "supersede" the equity receivership by the statutory one was an arbitrary assumption of power. In the reversal of that attempt, both priority of taking possession of property and the stage of advancement of liquidation, domiciliary and ancillary, are material considerations.

Lion Bonding and Surety Co. v. *Karatz*, 262 U. S. 77;
Harkin v *Brundage*, 276 U. S. 36;
Penn General Casualty Co. v. *Commonwealth of Pennsylvania*, 294 U. S. 189, 195, 196;
Kessler v. *William Necker, Inc.*, 258 Fed. 654, 661-2.

There is no principle of comity which authorizes one judge to substitute his discretion for that of others of the same Court previously exercised.

Hardy v. *North Butte Mining Co.*, 22 F. (2d) 62;
Humphrey v. *Bankers Mortgage Co.*, 79 F. (2d) 345, 352;
Johnson v. *Manhattan Railway Company, supra.*